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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 386

NATIONAL LEAD COMPANY, a Corporation,
Petitioner,

vs.

MAX SCHUFT and WILLIAM G. SCHUFT (plaintiffs), et al.,
Respondents.

RESPONDENTS' BRIEF OPPOSING GRANTING OF CERTIORARI

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I.

OPINION

The opinion of the Court of Appeals, Eighth Circuit, is still unpublished but a certified copy appears in the record (176).

II.

STATEMENT OF FACTS

Petitioner's statement of the case is incomplete and emphasizes defensive matter, properly for the jury but of no moment here. We therefore submit a brief statement of the proof which was the basis for the jury finding.

Numerals in parentheses, unless otherwise indicated, refer to the pages of the printed record.

Petitioner owned a large wooden building in which it processed bentonite, an inert clay found in the vicinity. It is taken from the ground in a wet, sticky condition (8). After being dried and ground bentonite is usable for various industrial purposes (8).

To facilitate drying the raw bentonite, it was cut or broken up into pieces suitable for grinding and fed to conveyor belts for movement to the dryers (8). Under the conveyor belts were numerous flames from gas jets maintained to keep the wet bentonite from sticking to the belts (7, 10, 15). At least two of the gas jet burners were generally in operation when bentonite was ground (15). These burners were made of pipes with holes forming the jets and the flames were produced by gas fed into the pipes (6-8). Such gas jets were also maintained under bins and chutes where the bentonite was transported and kept (6). The open conveyor fires were burning when bentonite was dried, whether it was winter or summer (11).

All these gas jet flames were open flames. They were all exposed to the air in the room (7, 14). There were hundreds, maybe a thousand, of such exposed flames (7, 10). There were such open flames on the second floor (6). The highest was about 10 feet below the level of the third floor (11). The highest of the furnaces was about six feet above the level of the second floor (15). For drying purposes the plant had four furnaces or combustion chambers which furnished the heat for the rotary driers. These furnaces were operated by oil flames which heated the air used to dry the bentonite (6). This air was heated to 1,800 to 2,000 degrees in the fire boxes (6, 13).

The furnaces were of fire brick with steel supports on the outside. On the sides there were large holes big

enough for a man to crawl through for the admission of excess air. One could put his hand in through this opening and there was no obstruction between the air of the room and the flame and heat inside the furnaces. That was true of all these furnaces (6, 13).

Without eliminating any open flames or making any change in the many sources of ignition, the defendant undertook a wholly new operation (81). It engaged in the grinding and packaging of weathered lignite coal sold under the trade name of humus. Defendant bought two carloads or about 80 tons of this substance from the American Aluminate Company of Bowman, N. D. (Exhibit C, 13).

The humus came from a lignite coal mine and consists of that portion of the coal nearest the surface (87). The weathering had some effect but the material was quite similar to the original lignite (87). Humus is a grade of coal (31). As to its inflammability it is very similar to lignite coal (30). The humus or lignite is more inflammable than Pocahontas and similar bituminous coal (30).

Humus lignite coal had been ground and sacked for several days (20) before the fire, causing great clouds of humus dust to become suspended in the air (22) settling on walls, ceilings, beams, catwalks, cobwebs, ladders and machinery (22-23). This grinding and dissemination of the dust continued up to 4:00 o'clock p. m. on the Saturday before the fire (16).

This dust was inflammable and had the properties of lignite coal dust (30). It would explode or burn upon coming in contact with fires or flames (30, 38). The analysis showed a high content of volatile matter (Exhibit B, 147). A dust cloud of this dust could ignite spontaneously without contact with a flame or spark (36). Upon ignition from a flame or from spontaneous com-

bustion there would be either a fast fire or explosion (36). The dividing line between explosion and fire is almost imperceptible (36). If the dust on walls, timbers and cobwebs was accidentally disturbed so that it fell and passed near a flame it would ignite and in turn ignite other dust or inflammable substances in close proximity (44).

The fire occurred on Sunday morning at 9:00 o'clock. Humus lignite had been ground up to 4 p. m. of the day before and the bentonite processing machinery was in motion up to and including the moment of the outbreak of the fire (16, 23). This included high temperature furnaces and hundreds, maybe a thousand open gas flames (23, 68).

On the morning of the fire the air was full of humus lignite dust (24). The machinery was running and kept it stirred up. During the hour which one workman worked before the fire, he had to use a respirator to protect his lungs and he had to change the filter (24). A man was collecting the dust lodged on the floor but was making no headway (24). Two workmen engaged in cleaning out a bin had to take turns, one going outside for fresh air while the other worked (23).

The fire started as a big puff which instantly filled the room with smoke and fire. It was like an explosion. It was not confined to any particular place but was all over. Just a bunch of smoke and fire all over. It seemed to take just a few seconds after the fire took off for it to get all over the building (24-25). A man working on a bin couldn't get out in time and was burned to death (25).

The trial court gave clear and comprehensive instructions on circumstantial evidence, strictly in accord with the South Dakota rule (128). There was no exception to the instructions.

Petitioner made the usual motions for a directed verdict on the identical ground now urged (50, 125) which the trial court denied.

After verdict petitioner moved the court for judgment notwithstanding the verdict or in the alternative for a new trial, on the same grounds, which was denied (153).

On appeal petitioner again brought forward its claim that under the South Dakota rule as to proof of facts by circumstantial evidence, the evidence was insufficient to support the verdict. In their brief and oral argument before the Court of Appeals respondents conceded that the rule as to proof of a fact by circumstantial evidence in a civil action is as stated in *Erickson v. Todd,* 62 S. D. 280, 252 N. W. 879, and *Meier & Lockwood Corp. v. Dakota Live Stock Co.,* 46 S. D. 397, 193 N. W. 138, and that the Court must apply such rule in South Dakota cases. Respondents at all times maintained that, measured by the strict South Dakota rule, the evidence was ample to establish the facts to which the circumstantial proof applied.

ARGUMENT

Point 1.

The local law is as set forth in the South Dakota cases cited by petitioner and all such cases were cited in the briefs filed in the Court of Appeals and considered by that Court. The Court of Appeals for the Eighth Circuit has followed and applied the South Dakota rule in several cases, notably *Hardware Mut. Inv. Co. v. Jacob Hieb, Inc.,* 146 F. (2d) 447; *Jackson County v. Duffy,* 147 F. (2d) 227; *Minnehaha County v. Kelley,* 150 F. (2d) 356, and *Turner County v. Miller,* 170 F. (2d) 820. In all these cases the Eighth Circuit Court gave full recognition to the local circumstantial evidence rule in strict conformity

to the "Erie Doctrine" as stated by this Court in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817.

The same is true of the case at bar. There is nothing in the opinion (176) indicating a departure from the rule. Judge Johnson, speaking for the Court, cites all of the South Dakota cases on the subject. Such cases establish the local law and the federal courts must apply it as revealed by the state decisions. The quotation in the opinion from *Meier & Lockwood Corp. v. Dakota Live Stock Inv. Co.,* 46 S. D. 397, 193 N. W. 138, indicates conclusively that the Court of Appeals sought to ascertain the meaning and scope of this local rule so as to use it as a yardstick in measuring the sufficiency of the evidence in this case. The opinion says:

> "And the South Dakota Supreme Court itself has said, quoting from Finkelston v. Chicago, Milwaukee & St. P. Ry. Co., 94 Wis. 270, 68 N. W. 1005, in relation to proof of the origin of a fire: 'Obviously it is no objection that the origin of the fire was not established by direct evidence. If such an occurrence is within reason, then it was for the jury to say whether the fire was so caused or not."

That the language used is that of the Supreme Court of Wisconsin does not militate against its effectiveness as a statement of the South Dakota rule. In *King v. Yancy,* 147 F. (2d) 379, it is said:

> "Circuit Court of Appeals, in determining Nevada law on a particular point, would accept as authoritative a California decision on such point which Supreme Court of Nevada had cited and followed."

It is clear, therefor, that the Court of Appeals has not decided any question involved in this case in conflict with applicable local decisions.

Point 2.

Petitioner says that the Court of Appeals failed to follow local law in that the decision is to the effect that respondents could recover if an inference in favor of respondents' theory was "within reason" as distinguished from established "with reasonable certainty."

The phrases "within reason" and "with reasonable certainty" are practically synonymous. Be that as it may, it must be kept in mind that the South Dakota Supreme Court, not the Court of Appeals, chose the phrase "within reason" as expressive of its conception of the rule whereby the sufficiency of circumstantial evidence should be determined.

The federal courts must determine for themselves the scope and nature of the state decisions that they are obliged to follow under the conformity statute and Rule of Civil Procedure 81. *Risty v. Rock Island, et al.,* 270 U. S. 378, 46 S. Ct. 236. This the Court of Appeals did. It determined the scope and meaning of the South Dakota rule relating to the quantum of proof where circumstantial evidence was used to prove a fact, and applying the rule, as laid down by the local court, it found the evidence ample as proof of the fact in question.

Point 3.

There being no question about the applicable South Dakota rule, we contend that this court should not be called upon merely to recanvas the evidence. As said by Judge Taft in *Lane & Bowler Corporation v. Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, review by certiorari is for cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

It is well settled that certiorari will not be granted to review questions of fact. *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413.

The record, however, leaves no room for doubt that the proof established with "reasonable certainty" that the fire was caused by the contact of the clouds of inflammable coal dust with one or more of the numerous sources of ignition maintained by petitioner for processing bentonite.

At the time of the fire the bentonite processing machinery was in operation (16, 23). This included high temperature furnaces and hundreds, maybe a thousand, open gas flames (23, 68). The air was full of humus lignite dust (24). The fire started as a big puff which instantly filled the room with smoke and fire. It was like an explosion. It was only a few seconds after the fire took off for it to get all over the large building (24-25).

These circumstances are entirely inconsistent with any other reasonable theory as to the cause and origin of the fire. It was a fast flash fire almost like an explosion. If caused by any other agency than the open flames igniting the inflammable coal dust, the fire would be comparatively slow, at least at the point of origin, and it would have taken considerable time for it to spread to all parts of the large building. The flash fire coming on like a puff or explosion is inconsistent with any theory as to the origin of the fire except that the open flames ignited the coal dust present, not only in and upon the frame structure, but which permeated the air to such an extent that rapid or flash propogation of the flame was possible. Wood in the shape of boards and timbers will not flash or explode upon being ignited. This coal dust upon ignition, under undisputed proof, would produce a flash fire or explosion.

No other rational theory as to the origin of the fire has any basis in the evidence. The Court of Appeals so determined upon a careful evaluation of the evidence.

Point 4.

Certiorari should not be granted here because (a) the petition fails to show that the Court of Appeals made any decision or ruling in conflict with South Dakota law; on the contrary the record shows full recognition and compliance with local law, and (b) the matter of the sufficiency of the evidence measured by the local yardstick, is for trial and appellate courts and their rulings on the quantum, weight and probative value of evidence should not be made the subject or review by certiorari in this court.

a.

We have heretofore pointed out that instead of disregarding local law the Court of Appeals definitely recognized the South Dakota rule and used it in determining the sufficiency of the evidence to support the jury verdict.

b.

The only question, then, is the sufficiency of the evidence in this particular case, a question twice squarely before the trial court and again determined by the Court of Appeals. This should be enough. This court should not be asked to reappraise proof already canvassed by trial and appellate courts except, perhaps, in a few cases where it is patent that the right to a jury trial has been wrongfully denied. *Wilkerson v. McCarthy,* 69 S. Ct. 413. It has been established that the jurisdiction of this court to review judgments of the Court of Appeals by certiorari is a jurisdiction to be exercised sparingly (*Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1025), and

only in extraordinary cases of peculiar gravity and importance. 36 *C. J. S.* 109. This court should not become a trier of fact except as stated by Justice Douglas in *Wilkerson v. McCarthy,* supra:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

Here, two courts passed on the evidence and found it sufficient under the applicable rule. The jury function was respected. These determinations should be final.

Respondents ask that the petition for certiorari be denied.

Respectfully submitted,

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